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No. 97-2000

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,
v.
DELORES SCOTT SULLIVAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Supreme Court of the United States, the National Association of Waterfront Employers (NAWE), the Master Contracting Stevedore Association of the Pacific Coast (MCSA), and Signal Mutual Indemnity Association, Ltd., move for leave to file this brief *amicus curiae* in support of Petitioners.[1]

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[1] Written consent has been obtained from Counsel for the Petitioners and filed with the Clerk of the Court. Counsel for Respondents has not so consented. Pursuant to Rule 37.6, counsel of record states that no part of this brief has been authored by counsel for either party or any other entity. Rather, it has been authored in its entirety by named counsel. No monetary contribution for the preparation of this brief was solicited or received from any party to the Petition. This brief was funded solely by the *amici*.

The first question presented in the petition for a writ of certiorari presents an important question of law, with ramifications well beyond the proper reach of the Fourteenth Amendment's Due Process Clause. The Circuit Court's broad state action/due process analysis is certain to influence state action jurisprudence as it may be applied to similar Fifth Amendment challenges to employer decisions to suspend benefit payments made under federal law. As this Court noted in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), due process analysis is the same within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.[2]

Any possible extension of the Circuit Court of Appeal's state action rationale to Fifth Amendment due process jurisprudence is of vital concern to *amici*. This concern is not academic. *Amici* call to the Court's attention the fact that the Circuit Court will shortly be in a position to extend its state action/due process rationale to questions arising under a *federal* statutory benefit scheme. Litigation is now pending within the circuit that presents a due process challenge based on the Fifth Amendment to the benefit scheme set forth in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA).[3]

[2] State action analysis is also the same under the Fifth and Fourteenth Amendments. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), a state action case arising under the Fifth Amendment and using Fourteenth Amendment analysis.

[3] See *Kreschollek v. Southern Stevedoring*, Civil No. 93-3903 (JHR) (D.N.J., Sept. 30, 1997). This litigation has a lengthy history. After the claimant informed the employer of the injury, the employer/insurance carrier initiated voluntary payments. Subsequently, after receiving further medical evidence, the insurance carrier suspended payments. Kreschollek then filed a claim with the Department of Labor, which the insurance carrier controverted under the LHWCA. The claimant also filed a separate Fifth Amendment due process facial challenge to the LHWCA's suspension provisions in federal District Court seeking a pre-deprivation hearing. The District Court has issued one decision on the state action aspect of the constitutional claim. See *id.* The Third Circuit Court of Appeals has also issued a decision on subject matter jurisdiction. *Kreschollek v. Southern Stevedoring*, 78 F.3d 868 (1996). Meanwhile, the ALJ assigned to adjudicate Kreschollek's underlying LHWCA claim rendered a decision finding it to be without merit, a decision upheld by the Benefits Review Board and ultimately by the Third Circuit. *Kreschollek v. Southern Stevedoring*, 129 F.3d 1255 (1997).

Despite the fact that the LHWCA permits private self-insured employers/insurance carriers to suspend—without a hearing—the payment of indemnity benefits initially paid to a claimant on a *voluntary* basis, one District Court has issued an order finding that, under the LHWCA's indemnity compensation scheme, insurance carriers (and, by implication, self-insured employers) are state/government actors for purposes of a Fifth Amendment based due process inquiry. The District Court's rationale parallels the rationale of the decision below, and both rely on many common authorities. The District Court has now scheduled a trial to determine whether or not the Due Process Clause requires a hearing before an employer may suspend these voluntary benefits.

Amici submit that the answer to the first question presented in the petition for review will have a direct effect on the 27,000+ decisions made each year by self-insured employers and/or insurance carriers subject to the LHWCA to either pay compensation benefits to claimants on a voluntary basis in the first instance, or to controvert benefit claims and delay payment until a formal award is made by the adjudicative arm of the Department of Labor. The self-insured employer-members of NAWE and the MCSA, along with all of the members of Signal Mutual Indemnity Association, Ltd., together comprise a substantial portion of the employers subject to the jurisdiction of the LHWCA and will be faced with making many of these financialy burdensome decisions.[4]

[4] The National Association of Waterfront Employers (NAWE), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose

Should the members of *amici* be confronted by this untenable choice, they are certain to be harmed. Instead of being faced with a statutory scheme encouraging the payment of voluntary benefit compensation, without the need for litigation, *amici* routinely will be placed in a position of either expending financial resources—even when undeserved and with no real prospect of recovering payments—until the Department of Labor can hear the case and render a decision, or suspending payment (and risking a penalty for non-payment) of benefits while forcing many claimants to forego a stream of benefits to which he or she may be temporarily entitled.

Amici submit that only review of the decision below can correct the Court of Appeals' misguided expansion of the state action doctrine, and prevent its likely application to future Due Process Clause challenges to employer benefit decisions taken under *federal* benefit laws. Accordingly, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of Petitioners' request for a writ of certiorari.

Respectfully submitted,

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35 member companies are private sector stevedores/marine terminal operators doing business throughout the U.S. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member private sector companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the maritime terminal and stevedoring services performed by private contractors to oceangoing vessels calling at ports in these states.

Signal Mutual Indemnity Association, Ltd. is the largest self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

QUESTIONS PRESENTED

1. Whether this Court should replace *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), with a "uniform and predictable standard" * for determining when a private party is subject to constitutional restraints as a state actor.

2. Whether a private party should be subject to constitutional restraints as a state actor only when the state has affirmatively influenced or coerced the private party's action (a "direction case") or participated in the private party's action (a "participation case").

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* *Burlington Industries, Inc. v. Ellerth*, —— U.S. ——, —— (June 26, 1998).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF THE AMICI CURIAE	1
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE WRIT SHOULD BE GRANTED IN THE INTEREST OF RESOLVING THIS COURT'S "DIFFICULT" STATE ACTION JURISPRUDENCE	4
II. BURTON'S "UNIQUE CONTEXT" STANDARD CAN BE REPLACED WITH A MORE PREDICTABLE STANDARD, CENTERED ON GOVERNMENT INFLUENCE OR PARTICIPATION	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Blum v. Yaretsky, 457 U.S. 991 (1982)	*passim*
Burlington Industries, Inc. v. Ellerth, —— U.S. —— (June 26, 1998)	7
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	*passim*
County of Washington, Oregon v. Gunther, 452 U.S. 161 (1981)	7
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)	7, 9
Flagg Brothers v. Brooks, 436 U.S. 149 (1978)	5, 8
Hohn v. United States, —— U.S. —— (June 15, 1998)	10
House v. Mayo, 324 U.S. 42 (1945)	10
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	5, 8
Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995)	6, 8
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	7, 8, 9
Polk County v. Dodson, 454 U.S. 312 (1981)	9
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	5, 8
San Francisco Arts and Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987)	6
Shelley v. Kraemer, 334 U.S. 1 (1948)	9
Smith v. Allwright, 321 U.S. 649 (1944)	7
West v. Atkins, 487 U.S. 42 (1988)	9
MISCELLANEOUS:	
Oxford English Dictionary (CD-ROM ed., ver. 1.02, 1992)	6

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The interest of *amici curiae* in this matter is detailed in the accompanying Motion for Leave to File Brief *Amicus Curiae* in Support of Petitioners and, in the interest of reducing the burden on the Court, will not be restated but is to be incorporated herein.

STATEMENT OF CASE

The petitioners in the present case are private insurance companies that provide workers' compensation insurance to employers in Pennsylvania and elsewhere. The respondents are ten employees and two employee organizations who claim that the petitioners violated the due process requirements of the Fourteenth Amendment when they decided to suspend payment for individual medical treatments pending independent utilization review of the reasonableness of the treatments. Petitioners' Appendix "Pet. App." at 9a.

The Pennsylvania workers' compensation statute contains a procedure for reviewing the reasonableness of a particular medical treatment. The procedure begins with a utilization review and report by an independent health care provider. Either the employee or the insurer may then obtain a de novo hearing before an administrative law judge. Pet. App. at 4a-9a.

This procedure is invoked by the insurer, who files a form with the State. The filing is *pro forma*. If it contains all the necessary information, the State authorizes the initiation of the review process. Pet. App. at 5a.

At this point, the insurer "may suspend payment for the medical treatment in question. [Citation omitted.] The Act does not require—but permits—suspension of medical benefits." Pet. App. at 5a. If the independent health care provider reports that the treatment is reasonable, the suspension must be lifted. Otherwise, it may continue until the administrative law judge makes a decision. Pet. App. at 9a.

The District Court dismissed the employees' complaint against the insurance companies on the ground that the companies' action was not state action under the Fourteenth Amendment. The District Court said (Pet. App. at 59a):

> [T]he decision to cease paying medical benefits is entirely up to the insurer acting independent of any state involvement whatsoever. The state takes no substantive step to promote, support or encourage the decision of the insurer; and after the decision is made, the state takes no action which influences the ultimate substantive determination as to whether benefits are payable or not. The state does not signficantly assist private actors when it merely provides a remedy, albeit complete with authorized forms and regulations. The state's acceptance and routing of forms * * * involves acquiescence and not compulsion on the part of the state.

The Court of Appeals reversed. On the same facts as those recited by the District Court, the Court of Appeals held (Pet. App. at 14a-15a):

> Although the insurance companies are private entities, when they act under the construct of the Workers' Compensation System, they are providing public benefits which honor State entitlements. In effect, they become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system.

SUMMARY OF ARGUMENT

The decision of the Circuit Court ignores several controlling opinions of this Court, especially *Blum v. Yaretsky*, 457 U.S. 991 (1982), issued as part of the 1982 trilogy of opinons that attempted to provide a degree of predictability to the admittedly difficult questions surrounding state action/due process jurisprudence. As such, review of the decision below should be viewed as an opportunity to replace the source of this difficulty, the unconstrained-by-precedent view of state action outlined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), with a more suitable test providing for greater predictability.

Amici submit that *Burton's* approach should now be rejected in favor of a more predictable test drawn from several recent precedents of the Court. Specifically, *amici* suggest that the actions of a private actor should only be held actionable under the state action/due process doctrine if the state has affirmatively influenced or coerced the private actor (a "direction case") or has participated in the private party's action (a "participation case").

Amici submit that failure to provide a predictable state action/due process test will result in numerous Due Process Clause challenges to other employer benefit decisions governed by *federal* benefit statutes.

ARGUMENT

I. THE WRIT SHOULD BE GRANTED IN THE INTEREST OF RESOLVING THIS COURT'S "DIFFICULT" STATE ACTION JURISPRUDENCE.

Amici submit that *Blum v. Yaretsky ("Blum")*, 457 U.S. 991 (1982) should have controlled the present case. There, state action was alleged in the "discharge or transfer of [Medicaid] patients to lower levels of care without adequate notice or hearings," * * * and "[t]he decisions about which respondents complain [were] made by physicians and nursing home administrators, all of whom are concededly private parties." *Id.* at 1005. This Court declined to hold that the private conduct in question was "the exclusive prerogative of the State," *id.* at 1011, refused to hold that "the State, by requiring completion of a form, is responsible for the physician's decision," *id.* at 1006-1007, and "conclude[d] that respondents have failed to establish 'state action' in nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care." *Id.* at 1012.

The Court of Appeals here distinguished *Blum* as not involving "a comprehensive statutory scheme similar to that present in this case." Pet. App. at 18a. But *Blum* involved Medicaid, a statutory scheme at least as comprehensive as workers' compensation. Also distinguished as not involving "a comprehensive statutory scheme" were *Rendell-Baker v. Kohn ("Rendell-Baker")*, 457 U.S. 830 (1982) (finding no state action when a private school fired employees despite the fact that the school was financed almost exclusively from public sources and was extensively regulated by government); *Flagg Brothers v. Brooks ("Flagg Brothers")*, 436 U.S. 149 (1978) (finding no state action when a private warehouseman invoked the self-help provisions of New York's Uniform Commercial Code by selling goods entrusted to him); and *Jackson v. Metropolitan Edison Co. ("Jackson")*, 419 U.S. 345 (1974) (finding no state action when a privately owned electric utility terminated a customer's electric service for nonpayment without a hearing). Pet. App. at 18a. In emphasizing the "comprehensive statutory scheme" as a code phrase for state regulation, the Court of Appeals here ignored *Blum's* admonition that "'[the] mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.'" 457 U.S. at 1004 (quoting from *Jackson*, 419 U.S. at 350).

The Court of Appeals emphasized the difficulty of finding a guiding legal principle in an area where "[v]arious cases have led to differing results in factual scenarios that, at least upon first impression, appear to be similar." Pet. App. at 13a. It then said (Pet. App. at 13a):

> To compound the confusion surrounding a state action examination, courts have employed various tests and standards that have been anything but a model of clarity.

The Court of Appeals concluded that it should base its decision upon "the unique context" of the facts before it. Pet. App. at 19a. In doing so, it accepted the authorization of *Burton v. Wilmington Parking Authority ("Bur-*

ton"), 365 U.S. 715 (1961), to treat each state action case as factually unique and, therefore, unconstrained by precedent.

Burton held that defining state action by private parties is an "impossible task." 365 U.S. at 722. It decided that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id. Burton* concluded that "readily applicable formulae may not be fashioned," so that each case "can be determined only in the framework of the peculiar facts or circumstances present." *Id.* at 725-726.[1] Justice Harlan, in dissent, characterized the *Burton* approach as "indiscriminately throwing together various factual bits and pieces." *Id.* at 728.

For the last thirty-seven years *Burton* has framed this Court's state action debate, with majority and dissenting opinions applying and distinguishing *Burton.* So much has *Burton* been at the center of the debate that Justices Brennan and Marshall, dissenting in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm. ("USOC"),* 483 U.S. 522 (1987), felt entitled to complain that Justice Powell's majority opinion in that case "fails to mention *Burton v. Wilmington Parking Authority,*" despite the fact that "[i]n each of the decisions principally relied on today [by the majority], the Court thought it important to discuss and distinguish *Burton.*" *USOC* at 556 n.12.

The result of this debate, according to the appellate court here, has been "one of the most troublesome issues of constitutional law." Pet. App. at 13a. This Court has acknowledged the problem as well, describing state action decisions as "difficult terrain," *Lebron v. National Rail-*

[1] The *Oxford English Dictionary* (CD-ROM ed., ver. 1.02, 1992) defines "peculiar" as "sui generis" (Definition 4a), which corresponds to the "unique context" approach of the Court of Appeals in the present case.

road Passenger Corp., 513 U.S. 374, 378 (1995), and as "not a model of consistency," *id.*, quoting from *Edmondson v. Leesville Concrete Co.,* 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting). Indeed, this Court alluded to the problem in 1982, when it said:

> [T]he Court has articulated a number of different factors or tests in different contexts * * * Whether these different tests are actually different in operation or simply different ways of characteriziig the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. See *Burton, supra,* at 722 * * *

Lugar v. Edmondson Oil Co. ("Lugar"), 457 U.S. 922, 939 (1982).

The problem inherent in the "fact-bound" *Burton* inquiry is that no decision is ever controlling on future cases unless the facts are exactly the same. What *Burton* really holds is that each succeeding court is free to assess the equities anew, as the Court of Appeals has done here in finding *Blum* not to be controlling because workers' compensation regulation is different from Medicaid regulation. As long as the *Burton* approach is alive, each state action decision of this Court is subject to being "treated like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington, Oregon v. Gunther,* 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), quoting from *Smith v. Allwright,* 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

Amici submit that the petition for a writ of certiorari should be granted in the interest of resolving the Court's "difficult" state action/due process jurisprudence. It is time to replace *Burton* with "a uniform and predictable standard." *Burlington Industries, Inc. v. Ellerth, supra,* —— U.S. at —— (June 26, 1998).

II. BURTON'S "UNIQUE CONTEXT" STANDARD CAN BE REPLACED WITH A MORE PREDICTABLE STANDARD, CENTERED ON GOVERNMENT INFLUENCE OR PARTICIPATION.

In 1982 this Court stated the objective of modern state action jurisprudence as follows:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar, supra, 457 U.S. at 936-937. This statement is incompatible with *Burton's* search for "the nonobvious involvement of the State in private conduct," 365 U.S. at 722, and with *Burton's* offspring, the "symbiotic relationship" test. See *Rendell-Baker, supra*, 457 U.S. at 847 (Marshall, J., dissenting).

This *Lugar* statement contemplates clear and usable boundaries around the state action concept. *Jackson, Flagg Bros., Blum, and Rendell-Baker* are examples of such boundaries.

> These cases differ markedly from the "interdependence" or "joint participation" analysis of Burton and stand for the principle that, unless the Government affirmatively influenced or coerced the private party to undertake the challenged action, such conduct is not state action for constitutional purposes.

Lebron, supra, 513 U.S. at 411 (O'Connor, J., dissenting). The principle just stated informs what *amici* have called the "direction case," in which a private party becomes a state actor if the state has affirmatively influenced or coerced the private party's action. What *amici* have called the "participation case" is illustrated by *Lugar* itself, in which a private party induced the state wrongfully to attach another's property. "[P]rivate use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment." *Lugar, supra*, 457 U.S. at 933. Other "participation cases" are *Edmonson v. Leesville Concrete Co. ("Leesville Concrete")*, 500 U.S. 614 (1991), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which private parties used court procedures to accomplish unconstitutional objectives:

> In [*Leesville Concrete*], the Court held that a private attorney's exercise of a peremptory challenge is attributable to the government and therefore subject to constitutional inquiry. Although the opinion cited *Burton, see* 500 U.S. at 621, 624, it emphasized that a private party exercising a peremptory challenge enjoys the 'overt, significant assistance of the court,' *id.*, at 624. The decision therefore is an application of *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948), which focused on the use of the State's coercive power, through its courts, to effect the litigant's allegedly unconstitutional choice.

Lebron, supra, 513 U.S. at 411 (O'Connor, J., dissenting).

"Given the pervasive role of government in our society, a test of state action predicated upon public and private 'interdependence' sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities. . . ." *Id.* "A more refined inquiry" (*id.*) is needed. *Amici* submit for the Court's consideration the direction and participation standards framed in our statement of the second question, presented above.[2]

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[2] Cases such as *West v. Atkins*, 487 U.S. 42 (1988) (state action found where the state delegates a nondelegable duty to a private actor), and *Polk County v. Dodson*, 454 U.S. 312 (1981) (state action not found in representation of a criminal defendant by a public defender paid from state funds because state supervision of the representation would be a conflict of interest) are special situations involving the role of government and are not included here.

CONCLUSION

The present case is an appropriate vehicle for reconsideration and replacement of the *Burton* standard. The reliance interest in *Burton* is minimal, because *Burton* articulated no predictable rule of law. Indeed, consistency is the greatest reliance objective, and *Burton* stands in the way. See *Hohn v. United States*, —— U.S. —— (June 15, 1998), overruling *House v. Mayo*, 324 U.S. 42 (1945) ("Once we have decided to reconsider a particular rule, however, we would be remiss if we did not consider the consistency with which it has been applied in practice. [Citations omitted.] This consideration, when combined with our analysis of the legal issue in question, convinces us the contrary holding of House v. Mayo cannot stand.")

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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